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Keeping Public Use Relevant in Stadium Eminent Domain Takings: The Massachusetts Way

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KEEPING PUBLIC USE RELEVANT IN STADIUM EMINENT DOMAIN TAKINGS: THE MASSACHUSETTS WAY

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Abstract: As the sports industry has grown into a multi-billion dollar enterprise, cities have increasingly faced the decision of whether to fund expensive stadium projects to attract or keep franchises. These projects commonly include using public funds and the government's eminent domain power under the Public-Use Clause of the Fifth Amendment. Unlike traditional public uses such as infrastructure and utilities, multipurpose stadiums present a unique challenge for courts. The Second Circuit in *Goldstein v. Pataki* handled the public-use analysis by allowing any amount of traditional public-use justification to shield a stadium project from pretext challenges. This Note argues that by broadening the public-use analysis, the *Goldstein* court effectively foreclosed any feasible pretext claim against a stadium project, which always has a traditional public-use justification. It proposes that in general, the Massachusetts legislature's approach to public-use analysis for stadium construction provides a strong starting point in protecting public use from improper private benefits. In Massachusetts, the government grants public funding and land condemnation for the portions of a stadium project that satisfy the traditional public-use analysis, while the government requires teams to pay for any portions that only benefit the franchise. In doing so, the state has struck a stronger balance between protecting the public from unconstitutional takings while ensuring the viability of future stadium projects.

INTRODUCTION

On November 3, 2012, nearly 18,000 basketball fans gathered at the Barclays Center, the new state-of-the-art 675,000-square-foot sports arena located in the heart of Brooklyn, to watch the inaugural game of the city's new professional basketball franchise, the Brooklyn Nets.[1] On their way to the $1 billion arena, fans likely walked through the Atlantic

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[1] Benjamin Hoffman, *New Home, New Lineup and a Fresh Result*, N.Y. TIMES, Nov. 3, 2012, at SP1; *Brooklyn Nets News Update*, INSIDEHOOPS.COM, http://www.insidehoops.com/brooklyn-nets.shtml (last updated Apr. 13, 2012).

Yards, a proposed $4.9 billion development comprising new luxury high-rise condominiums, office buildings, and department stores.[2] Numerous city luminaries and celebrities attended the celebration, including rapper Jay-Z, who once held a minority stake in the Brooklyn Nets, and New York City Mayor Michael Bloomberg, who officially broke ground for the project in 2010.[3]

What many likely did not realize was that more than fifty years ago, a different team planned a similar celebration to take place near the same site.[4] In 1955, Brooklyn Dodgers owner Walter O'Malley proposed that the city develop a new stadium for his team.[5] O'Malley complained that the team had outgrown its stadium, Ebbets Field, and he wanted a new, larger, domed ballpark[6] at a plot of land at the intersection of Atlantic Avenue and Flatbush Avenue.[7] The Parks Commissioner criticized O'Malley for wanting to use public money and its eminent domain powers to acquire the land and build a sports stadium.[8] When the city denied O'Malley's request, he entered an agreement

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[2] *See* N.R. Kleinfield, *For Brooklyn's New Arena, Day 1 Brings Hip-Hop Fans and Protests*, N.Y. Times, Sept. 28, 2012, http://www.nytimes.com/2012/09/29/nyregion/barclays-centers-opening-is-met-with-protests.html?pagewanted=all&_r=0; Liz Robbins, *What to Expect in New York in 2012: Brooklyn*, N.Y. Times, Jan. 1, 2012, http://www.nytimes.com/interactive/2012/01/01/nyregion/01a-year-ahead-in-new-york.html?amp=&pagewanted=all (follow "Brooklyn" hyperlink image of Brooklyn Bridge).

[3] Matt Flegenheimer, *For Fans, Debut Is More of an Escape Than a Celebration*, N.Y. Times, Nov. 3, 2012, at SP10; Howard Beck, *Jay-Z Makes 'Brooklyn Nets' Name Official*, Off the Dribble, N.Y. Times N.B.A. Blog (Sept. 26, 2011, 12:27 PM), http://offthedribble.blogs.nytimes.com/2011/09/26/jay-z-makes-brooklyn-nets-name-official/; Zack O'Malley Greenburg, *Jay-Z Sells Nets Stake, Earns Warren Buffett-Like Return*, Forbes.com (Apr. 19, 2013, 3:57 PM), http://www.forbes.com/sites/zackomalleygreenburg/2013/04/19/jay-z-sells-nets-stake-earns-warren-buffett-like-return/; Press Release, Office of Mayor Michael R. Bloomberg, Mayor Announces New Commitment to Ensure First Residential Building is Affordable, PR-108-10 (Mar. 11, 2010), *available at* www.nyc.gov/html/om/html/2010a/pr108-10.html.

[4] *See* Norman Oder, *A Sports Myth Grows in Brooklyn*, Colum. Journalism Rev. (Mar. 18, 2011, 1:37 PM), http://www.cjr.org/behind_the_news/a_sports_myth_grows_in_brooklyn.php?page=all (politicians, newspapers, and the developer made claims that the new arena was on the exact same site as O'Malley's desired site for Dodger Stadium, which was incorrect); John Manbeck, *Stadium Battles Both Past and Present*, Brooklyn Paper, Feb. 7, 2004, http://www.brooklynpaper.com/stories/27/5/27_05nets6.html.

[5] *See* Robert M. Jarvis, *When the Lawyers Slept: The Unmaking of the Brooklyn Dodgers*, 74 Cornell L. Rev. 347, 352 (1989); Manbeck, *supra* note 4.

[6] Manbeck, *supra* note 4.

[7] Jarvis, *supra* note 5, at 351.

[8] *See* Manbeck, *supra* note 4. The Parks Commissioner, Robert Moses, said "Walter honestly believes that he, in himself, constitutes a public purpose" in response to O'Malley's arguments for a new stadium. *Id.*

with Los Angeles to move the team in exchange for a new stadium built using public funds and the city's condemnation powers.[9]

The political landscape of the city has changed since Brooklyn denied O'Malley a new stadium for the Dodgers in the 1950s.[10] In the early 2000s, Bruce Ratner, a New York real estate developer, conceived a development plan also on the corner of Atlantic and Flatbrush Avenue.[11] Private landowners, however, owned a portion of the site and buying the land would take years and millions of dollars.[12] Therefore, instead of negotiating with hundreds of landowners, Ratner bought the New Jersey Nets, a historically unsuccessful basketball franchise with an owner looking to sell.[13] After purchasing the Nets, Ratner used the team as leverage for a large real estate project that required Brooklyn city officials to use the city's eminent domain powers to acquire the land.[14] As part of the development deal, the twenty-two-acre plot of land would include a new basketball arena, luxury condominiums, and office towers.[15]

In *Goldstein v. Pataki*, community members living on the condemned land challenged the taking in federal court, arguing that the taking of their land for a professional basketball stadium did not meet the Constitution's public-use requirement.[16] On appeal, in 2008, the Second Circuit broadened the public-use analysis by giving deference to legislatures while requiring plaintiffs to find *no* public purpose at all in a taking.[17] In light of the trend to build multi-purpose areas such as pub-

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[9] *See* Zack O'Malley Greenburg, *Who Framed Walter O'Malley?*, FORBES.COM (Apr. 14, 2009, 6:00 PM), http://www.forbes.com/2009/04/14/brooklyn-dodgers-stadium-lifestyle-sports-baseball-stadiums.html.

[10] *See* Editorial, *The Brooklyn Nets*, N.Y. TIMES, July 4, 2004, at CY9 (arguing that city officials should weigh the stadium proposal using a cost-benefit analysis).

[11] *See* Malcolm Gladwell, *The Nets and NBA Economics*, GRANTLAND (Sept. 26, 2011, 12:00 AM), http://www.grantland.com/story/_/id/7021031/the-nets-nba-economics; Oder, *supra* note 4.

[12] *See id.*

[13] *See id.*; *Nets Season Records*, http://www.nba.com/nets/season_records.html (last visited Mar. 1, 2012). Since the 1985 season, the Nets have failed to qualify for the playoffs 15 times. *Nets Season Records*, *supra*.

[14] *See* Charles V. Bagli, *Atlantic Yards Wins Appeal to Seize Land*, N.Y. TIMES, Nov. 25, 2009, at A1; Gladwell, *supra* note 11 (describing the New Jersey Nets purchase as "eminent domain insurance" to acquire the land).

[15] *See* Goldstein v. Pataki, 516 F.3d 50, 53 (2d Cir. 2008); Gladwell, *supra* note 11.

[16] Goldstein v. Pataki, 488 F. Supp. 2d 254, 278 (E.D.N.Y. 2007), *aff'd*, 516 F.3d 50 (2d Cir. 2008); *Brooklyn Property Owners and Tenants to Announce Federal Eminent Domain Lawsuit Against Pataki, Ratner, Gargano, Bloomberg and Doctoroff*, DEVELOP DON'T DESTROY BROOKLYN, http://www.dddb.net/php/latestnews_Linked.php?id=299 (posted Oct. 25, 2006).

[17] *See Goldstein*, 516 F.3d at 58, 60.

lic stadiums that serve as the venue for sporting events, music concerts, and theater performances, the burden of proving that a stadium project has no public purpose at all is insurmountable.[18] This Note argues that among the forty-four states that have passed eminent domain reforms to achieve a better balance between public use and private purpose, the Massachusetts approach presents a stronger alternative to protect the public-use doctrine when a stadium project is at issue.[19] Massachusetts, which has not passed any significant eminent domain reform, approves stadium projects using a series of principles that narrowly define when public use is justified.[20] In doing so, the Commonwealth struck a balance not considered by the New York court in *Goldstein*.[21]

Part I begins by exploring the development of eminent domain law and its path to the landmark decision, *Kelo v. City of New London*.[22] It then tracks the legislative attempts on the federal and state level to limit economic development as a public purpose after the *Kelo* decision.[23] Part II tracks the evolution of sports stadium public-use analyses and provides an in-depth look at the *Goldstein* decision.[24] Part III tracks Massachusetts's approach to public use, beginning with its origins and moving to modern examples.[25] Finally, Part IV argues that although stadium projects should not be categorically denied public-use status legislatures can better protect the public's tax dollars by implementing stronger enforcement language in its stadium legislation.[26]

I. A History of Eminent Domain in the United States

A. *The Road to* Kelo

Courts consistently have held that the use of the government's power of eminent domain to appropriate private property through

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[18] *See* Ilya Somin, *Let There Be Blight: Blight Condemnations in New York After* Goldstein *and* Kaur, 38 Fordham Urb. L.J. 1193, 1208–09 (2011) (discussing the difficulties of bringing blight condemnation challenges on public use grounds after the *Goldstein* decision).

[19] *See 50 State Report Card: Tracking Eminent Domain Reform Legislation Since* Kelo, Castle Coal., http://castlecoalition.org/index.php?option=com_content&task=view&id=2412&Itemid=129 (last updated Nov. 9, 2012).

[20] *See infra* notes 158–170 and accompanying text.

[21] *See Goldstein*, 516 F.3d at 64–65.

[22] *See infra* notes 27–79 and accompanying text.

[23] *See infra* notes 80–99 and accompanying text.

[24] *See infra* notes 100–153 and accompanying text.

[25] *See infra* notes 154–194 and accompanying text.

[26] *See infra* notes 196–261 and accompanying text.

condemnation is necessary to the function of a modern state.[27] The government's authority to seize property originated in English common law.[28] During the seventeenth century, colonial governments exercised their eminent domain authority, albeit infrequently.[29] Although the U.S. Supreme Court held that the government's condemning authority for proper public purpose is "well-nigh conclusive," the Fifth Amendment of the U.S. Constitution provides limitations on how and when a seizure of land may occur.[30] The Fifth Amendment states: "nor shall private property be taken for public use, without just compensation."[31] Thus, in eminent domain challenges, courts generally examine whether the government used the seized property for a public-post-condemnation use and whether it paid appropriate compensation.[32] In practice, the Fifth Amendment protects a property owner from conferring a benefit on another private party through a government-mandated transfer of property without a public purpose, even if the government paid compensation.[33]

Generally, the courts are the mechanism for enforcing the public-use requirement, but public officials, on the other hand, actually determine the public use.[34] The U.S. Supreme Court has repeatedly held that the role for courts in reviewing a legislature's determination of public use is "an extremely narrow" one.[35] The Court has reasoned that this limited review is proper because legislatures are better suited to assess public uses.[36] Because of this deferential standard, a court must limit its review of a legislature's public-use determination to whether

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[27] *See* U.S. Const. amend. V; Georgia v. City of Chattanooga, 264 U.S. 472, 480 (1924); Rosenthal & Rosenthal, Inc. v. N.Y. State Urban Dev. Corp., 771 F.2d 44, 45 (2d Cir. 1985).

[28] 2A Julius L. Sackman, Nichols on Eminent Domain, § 7.01[2], at 7-19 (3d ed. 2011) ("The principle that private property may be taken for public uses can be traced to early English common law which presumed that the king ultimately held the title to all the land.").

[29] Daniel B. Kelly, *The "Public Use" Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence*, 92 Cornell L. Rev. 1, 9 (2006).

[30] *See* U.S. Const. amend. V; Berman v. Parker, 348 U.S. 26, 32 (1954).

[31] U.S. Const. amend. V.

[32] Alberto B. Lopez, *Revisiting* Kelo *and Eminent Domain's "Summer of Scrutiny,"* 59 Ala. L. Rev. 561, 566–67 (2008).

[33] Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 245 (1984) (holding that a purely private taking could not withstand the scrutiny of the public-use requirement, and thus it would serve no legitimate purpose of government and would be void); Thompson v. Consol. Gas Utils. Corp., 300 U.S. 55, 80 (1937) (citing cases where takings for private benefit without public use are invalid); *see* Lopez, *supra* note 32.

[34] *See Midkiff*, 467 U.S. at 240; *Berman*, 348 U.S. at 32; *Goldstein*, 516 F.3d at 57.

[35] *Midkiff*, 467 U.S. at 240; *Berman*, 348 U.S. at 32.

[36] *Midkiff*, 467 U.S. at 244.

"the exercise of the eminent domain power is rationally related to a conceivable public purpose."[37]

In early U.S. Supreme Court decisions, the Court indicated that takings for private parties without public benefits violated the public-use requirement.[38] As technology advanced and corporations began to grow increasingly complex, however, governments began using their eminent domain powers to assist private firms.[39] In 1916, in *Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.*, the Supreme Court expanded the definition of public use by holding that government takings appropriate for private parties may not violate the Fifth Amendment.[40] In *Mt. Vernon*, the state initiated eminent domain proceedings to take land, water, and water rights from the plaintiff so a power company could create and sell hydroelectric power.[41] The Court held that even though the taking benefitted a private party, it also had a public purpose to "save mankind from toil that it can be spared" and acknowledged the limitations of requiring explicit public use for eminent domain takings.[42]

As the Court expanded its definition of public use, it also began showing greater deference to legislatures exercising their eminent domain powers.[43] In 1954, in *Berman v. Parker*, the Court evaluated the constitutionality of a law aimed at eradicating the problems of blight and substandard housing in a Washington, D.C. neighborhood.[44] The Justices unanimously held that "[t]he concept of the public welfare is

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[37] *Id.* at 241.

[38] *See* Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain 178 (1985) ("The nineteenth-century view . . . was that it was a perversion of the public use doctrine to acquire land by condemnation for [private] purposes."); *see, e.g.*, Mo. Pac. Ry. Co. v. Nebraska, 164 U.S. 403, 417 (1896) (holding that a government decision to compel a railroad company to provide land to farmers for a grain elevator at its railway station was a violation of the Due Process Clause of the Fourteenth Amendment).

[39] William A. Fischel, *The Political Economy of Public Use in* Poletown: *How Federal Grants Encourage Excessive Use of Eminent Domain*, 2004 Mich. St. L. Rev. 929, 933 (2004) ("Thus, private developers of reservoirs, canals, railroads, oil and gas pipelines, power dams, and telephone and electric-power lines all got the right of eminent domain at one time or another.").

[40] 240 U.S. 30, 32 (1916).

[41] *Id.* at 30–31.

[42] *Id.* at 32.

[43] *See* Old Dominion Land Co. v. United States, 269 U.S. 55, 66 (1925) (holding that when "Congress has declared the purpose to be a public use . . . [i]ts decision is entitled to deference until it is shown to involve an impossibility"); Rindge Co. v. Los Angeles County, 262 U.S. 700, 709 (1923) (holding that the legislature determines whether appropriating private property is for public use); Kelly, *supra* note 29, at 11.

[44] *Berman*, 348 U.S. at 28–31.

broad and inclusive" and a statute targeting blight did not violate the Public-Use Clause of the Fifth Amendment, even if some private land would be taken and transferred to private developers.[45] *Berman* affirmed the Court's broad definition of public use and its deference to legislative findings.[46]

The Court next heard a challenge against its broad interpretation of public use in *Hawaii Housing Authority v. Midkiff*.[47] In *Midkiff*, the Hawaii Legislature enacted a statute allowing it to acquire fee simple titles through eminent domain and transfer those titles to private parties.[48] The statute allowed tenants to request eminent domain proceedings on their landlord's property and permitted these tenants to purchase the property.[49] A private landowner whose property the government targeted argued that the statute violated the Fifth Amendment.[50] The Court affirmed its holding in *Berman* and held that the state's conveyance to private parties did not necessarily lead to an unconstitutional taking.[51] The Court held that it would "not substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.'"[52]

Taking guidance from the Supreme Court's decisions in *Berman* and *Midkiff*, lower federal courts have held that once a proper public use has been established, the taking is constitutional.[53] One successful

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[45] *See id.* at 33, 35–36.

[46] *See* James Geoffrey Durham, *Efficient Just Compensation as a Limit on Eminent Domain*, 69 MINN. L. REV. 1277, 1282 (1985) ("Thus, the *Berman* Court not only gave an almost unlimited meaning to public use, it also drew a very limited role for courts reviewing whether such actions were taken in the public welfare.").

[47] *See* 467 U.S. at 239–41.

[48] HAW. REV. STAT. § 516-83 (2011); *Midkiff*, 467 U.S. at 233. The purpose of the act was to correct Hawaii's land oligopoly, which "created artificial deterrents to the normal functioning of the State's residential land market and forced thousands of individual homeowners to lease, rather than buy, the land underneath their homes." *Midkiff*, 467 U.S. at 241–42.

[49] HAW. REV. STAT. § 516-22; *Midkiff*, 467 U.S. at 233.

[50] *Midkiff*, 467 U.S. at 234–35.

[51] *See id.* at 244; *Berman*, 348 U.S. at 35–36 (holding that once public purpose has been decided, government agencies, rather than courts, have the power determine the scope of a taking). Specifically, the Court rejected any "literal requirement" that condemned property needed to be used for the general public. *Midkiff*, 467 U.S. at 244.

[52] *Midkiff*, 467 U.S. at 241.

[53] *See, e.g.*, United States v. 14.02 Acres of Land, 547 F.3d 943, 949, 952 (9th Cir. 2008) (citing *Berman* in holding that a project that was the partnership between private and public entities satisfied public use for a taking); Rosenthal & Rosenthal Inc. v. N.Y. State Urban Dev. Corp., 771 F.2d 44, 45 (2d Cir. 1985) (citing *Berman* and *Midkiff* in holding that redevelopment of a blighted area satisfied the public use requirement); Ledford v. Corps of

challenge in federal court, however, has been to use circumstantial evidence to find pretext in an eminent domain condemnation.[54] In *99 Cents Only Stores* v. *Lancaster Redevelopment Agency*, a California federal district court held that a city's eminent domain plan failed a rational public purpose test.[55] The plaintiff, who owned a discount general goods store, established his store next to a large national retail chain that threatened to relocate to a neighboring area if the city did not approve an eminent domain condemnation of the plaintiff's land.[56] The court held that the defendant's public purpose justification, which was to prevent the "reestablishment of blight," did not satisfy the public use requirement.[57] In its decision, the court also noted that pretext played a role in its analysis, as "*the very reason* that [the defendant] decided to condemn [plaintiff's] leasehold interest was to appease [the retail chain]. Such conduct amounts to an unconstitutional taking for purely private purposes."[58]

B. Kelo: *Private Benefit and the Pretextual Purpose*

In 2005, the Court expanded its public-use analysis to allow government takings that have the potential to benefit the community at large, even if the takings also directly benefit private interests.[59] In *Kelo*

Eng'rs, 500 F.2d 26, 28 (6th Cir. 1974) (citing *Berman* in holding that plaintiff's concession of a project's public purpose satisfied the public use requirement).

[54] *See* 99 Cents Only Stores v. Lancaster Redev. Agency, 237 F. Supp. 2d 1123, 1126–27, 1128, 1131 (C.D. Cal. 2001). In *99 Cents*, the court described pretext:

> If officials could take private property, even with adequate compensation, simply by deciding behind closed doors that some other use of the property would be a "public use," and if those officials could later justify their decisions in court merely by positing "a conceivable public purpose" to which the taking is rationally related, the "public use" provision of the Takings Clause would lose all power to restrain government takings.

Id. at 1129 (quoting Armendariz v. Penman, 75 F.3d 1311, 1321 (9th Cir. 1996)). The U.S. Supreme Court has provided little guidance to lower courts on how to determine whether pretext exists in a taking. *See* Daniel B. Kelly, *Pretextual Takings: Of Private Developers, Local Governments, and Impermissible Favoritism*, 17 Sup. Ct. Econ. Rev. 173, 174 (2009).

[55] *See* 237 F. Supp. 2d at 1130–31 (holding that "future blight" is not a rational public purpose).

[56] *Id.* at 1125–27. In the agreement, the city agreed to sell the land to the retail chain for a nominal fee of one dollar. *Id.* at 1126.

[57] *Id.* at 1129–30.

[58] *See id.* at 1129; Nicole Stelle Garnett, *The Public-Use Question as a Takings Problem*, 71 Geo. Wash. L. Rev. 934, 968 (2003). The court noted that the city's condemnation plan was "nothing more than the desire to achieve the naked transfer of property from one private party to another." *99 Cents Only Stores*, 237 F. Supp. 2d at 1129.

[59] Kelo v. City of New London, 545 U.S. 469, 489–90 (2005).

v. City of New London, the Court rejected a challenge to a city's eminent domain proposal to transfer condemned land to a private development corporation.[60] According to the city, the purpose of the project was to promote economic renewal by transforming seven privately owned, non-blighted parcels of land.[61] In its decision, the Court recounted the historically narrow interpretation of public use from the nineteenth century courts, where the public had to directly benefit from the acquired property.[62] After chronicling the historical roots of eminent domain, the Court recognized that *Berman* and *Midkiff* "repeatedly and consistently rejected" interpreting public use so narrowly.[63] Accordingly, the Court adopted a "more natural interpretation of public use" and held that even though the takings benefitted a private interest, the city's condemnation "unquestionably serves a public purpose" and satisfied the Fifth Amendment.[64]

Justice John Paul Stevens, writing for the narrow 5-to-4 majority, relied on *Berman* and *Midkiff* to base the decision in part on a "policy of deference to legislative judgments."[65] Using reasoning from *Midkiff*, the majority opinion emphasized that the taking's purpose, rather than its "mechanics" is what "matters in determining public use."[66] The Court rejected the plaintiff's argument that transferring property to private developers required a heightened degree of judicial scrutiny or that the city needed to provide evidence that the takings would achieve the economic benefits that justified the public use.[67]

The Supreme Court also—for the first time—expressly recognized pretext challenges to eminent domain actions.[68] The Court opined, "the City [would not] be allowed to take property under the mere pre-

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[60] *Id.* at 473–75, 489.

[61] *Id.* at 474–75.

[62] *See id.* at 479 (noting that the narrow view "steadily eroded over time" and was "difficult to administer . . . given the diverse and always evolving needs of society").

[63] *See id.* at 480–82; *Midkiff*, 467 U.S. at 241–42, 244; *Berman*, 348 U.S. at 34–35; *see also* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1014–15 (1984) ("This Court, however, has rejected the notion that a use is a public use only if the property taken is put to use for the general public.").

[64] *Kelo*, 545 U.S. at 480, 484.

[65] *Id.* at 480–82; *Midkiff*, 467 U.S. at 241–42, 244; *Berman*, 348 U.S. at 34–35. The majority emphasized that courts should not "second-guess the City's considered judgments about the efficacy of [the] development plan." *Kelo*, 545 U.S. at 488.

[66] *Kelo*, 545 U.S. at 482; *Midkiff*, 467 U.S. at 244.

[67] *Kelo*, 545 U.S. at 486–87.

[68] *Id.* at 478; *Goldstein*, 516 F.3d at 60 ("*Kelo* opened up [an] avenue for a takings challenge under which a plaintiff could claim a taking had been effectuated under the mere pretext of a public purpose, when [the] actual purpose was to bestow a private benefit." (second alteration in original) (internal quotation marks omitted)).

text of a public purpose, when its actual purpose was to bestow a private benefit."[69] After the Court examined the motive of the city in *Kelo*, it determined that the city did not adopt the development plan to benefit particular individuals, but rather, to benefit the public with job creation, increased tax revenue, and new commercial, residential, and recreational buildings.[70] Because Justice Stevens determined there was no pretext in the case, the Court did not further explore the issue.[71]

Justice Anthony Kennedy in his concurring opinion elaborated on pretext claims, asserting that courts analyzing the Public-Use Clause should strike down takings that clearly show favorable benefits to a private party with only incidental public benefits.[72] Justice Kennedy quoted the trial court, agreeing that when the purpose of a taking is economic development to benefit private parties, the reviewing court should determine whether the stated public purposes are "incidental to the benefits that will be confined on private parties."[73] Because the Court found no pretext in *Kelo*, Justice Kennedy anticipated future cases may further define the pretext standard.[74]

In dissent, Justice Sandra Day O'Connor criticized the majority for making private property vulnerable under the "banner of economic development."[75] The dissent argued that in *Midkiff* and *Berman*, public use was justified because the government's eminent domain actions remedied an "affirmative harm on society."[76] Unlike the Court's precedents, in *Kelo*, the majority's rationale of economic development was incidental to the condemnation of land for private parties.[77] Justice O'Connor argued that the economic development rationale is problematic because the private benefit and incidental public benefit are "merged and mutually reinforcing," meaning that it would be nearly

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[69] *Kelo*, 545 U.S. at 478.

[70] *Id.* at 483.

[71] *Id.* at 478.

[72] *Id.* at 491 (Kennedy, J., concurring).

[73] *Id.*

[74] *Id.* at 493. Justice Kennedy described pretext as "undetected impermissible favoritism." *Id.*

[75] *Kelo*, 545 U.S. at 494 (O'Connor, J., dissenting).

[76] *Id.* at 500; *see Midkiff*, 467 U.S. at 232; *Berman*, 348 U.S. at 30.

[77] *Compare Kelo*, 545 U.S. at 501 (O'Connor, J., dissenting) (finding that eminent domain transfer of land to a private party satisfies public use if it results in secondary benefit for the public), *with Midkiff*, 467 U.S. at 232, 245 (upholding condemnation scheme redistributing title when 22 landowners owned 72.5 percent of all fee simple titles in Oahu), *and Berman*, 348 U.S. at 30, 36 (upholding condemnation to repair blight when 64.3 percent of the dwellings were beyond repair).

impossible to isolate pretext from incidental public benefits.[78] Justice Clarence Thomas went even further in his dissent, urging the Court to move back to a narrow reading of the Public-Use Clause that only applies when if a taking directly benefits the public.[79]

C. *The Federal and State Response to* Kelo

Both federal and state governments reacted immediately to the *Kelo* decision by proposing and passing legislation designed to limit its reach. Although federal legislative attempts have proven difficult to get through Congress, an overwhelming number of states have passed legislation clarifying and amending their eminent domain laws.

1. Federal Legislative Response

Quick on the heels of the *Kelo* decision, the U.S. Congress proposed legislation to limit the government's eminent domain powers.[80] Just one day after the *Kelo* decision, the House of Representatives passed a resolution by a vote of 365 to 33, expressing "grave disapproval" of the Supreme Court in *Kelo* for nullifying the "protections afforded private property owners."[81]

Congressional disapproval of the *Kelo* decision led to several attempts to limit its impact. For instance, Representative Robert B. Aderholt proposed an amendment to the Constitution preventing the federal government or any state government from taking property and transferring it to a private party "except for a public conveyance or transportation project."[82] In the Senate, just four days after the *Kelo* decision, Senator John Cornyn introduced The Protection of Homes, Small Businesses, and Private Property Act of 2005.[83] The bill cited the Supreme Court's *Kelo* decision and responded by stating that eminent

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[78] *Kelo*, 545 U.S. at 502.

[79] *Id.* at 508 (Thomas, J., dissenting). "[T]he government may take property only if it actually uses or gives the public a legal right to use the property." *Id.* at 521.

[80] *See* Ilya Somin, *The Limits of Backlash: Assessing the Political Response to* Kelo, 93 MINN. L. REV. 2100, 2149–54 (2009); Mike Allen & Charles Babington, *House Votes to Undercut High Court on Property*, WASH. POST, July 1, 2005, at A1.

[81] H.R. Res. 340, 109th Cong. (2005).

[82] H.R.J. Res. 60, 109th Cong. (2005); *see also* H.R. 2980, 109th Cong. (2005) (proposing an amendment to the Internal Revenue Code allowing condemned landowners from paying taxes on the money they receive in excess of the value of the property).

[83] S. 1313, 109th Cong. § 1 (2005). During his floor statement, Senator Cornyn described the *Kelo* decision as "alarming" and "a disappointment." 152 CONG. REC. 12,492–93 (2006) (statement of Sen. John Cornyn).

domain could only be used "for public use."[84] In a rebuke to the *Kelo* court, the bill defined public use to exclude "economic development" and applied the law to federal, state, and local government condemnations.[85]

Although Senator Cornyn's bill halted in the judiciary committee,[86] on October 19, 2005, Congress amended a Transportation, Treasury, Housing and Urban Development Appropriations bill to include a section resembling Senator Cornyn's bill.[87] The amendment barred federal transportation funds in projects that used eminent domain for "economic development that primarily benefits private entities."[88] On November 30, 2005, President George W. Bush signed the amended bill into law.[89]

2. The State Legislative Response

Kelo set the minimum constitutional requirement for eminent domain takings, but states could impose greater restrictions.[90] The majority in *Kelo* wrote, "[n]othing in our opinion precludes any State from placing further restrictions on its exercise of the takings power."[91] At least forty-four states have done just that, passing legislation to limit the decision's expansion of public use.[92] For example, after *Kelo*, the Flor-

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[84] S. 1313 § 2(6).

[85] *Id.* § 3(b)–(c).

[86] *See Bill Summary & Status: 109th Congress (2005–2006) S. 1313*, Library of Congress: Thomas, http://thomas.loc.gov/cgi-bin/bdquery/D?d109:1313:./list/bss/d109SN.lst:@@@ X (last visited May 18, 2013).

[87] S. Amdt. 2113, 109th Cong. (2005); 151 Cong. Rec. 23,154–55 (2005) (statement of Sen. Christopher S. Bond) ("No funds in this Act may be used to support any federal, state, or local projects that seek to use the power of eminent domain, unless eminent domain is employed only for a public use . . . .").

[88] S. Amdt. 2113, 109th Cong. (2005); 151 Cong. Rec. 23,154–55 (2005) (statement of Sen. Christopher S. Bond). On November 3, 2005, the House also passed the Private Property Rights Protection Act of 2005, which defined "economic development" as taking private property and conveying the property "to another private person or entity for commercial enterprise carried on for profit." H.R. 4128, 109th Cong. (2005). The bill was received in the Senate and referred to the Committee on the Judiciary, but never reached a vote. *See Bill Summary & Status: 109th Congress (2005–2006) H.R. 4128*, Library of Congress: Thomas, http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR04128:@@@C (last visited May 18, 2013).

[89] Transportation, Treasury, Housing and Urban Development, the Judiciary, the District of Columbia, and Independent Agencies Appropriations Act for Fiscal Year 2006, Pub. L. No. 109-115, § 726, 119 Stat. 2396, 2494–95 (2005).

[90] 545 U.S. at 489–90.

[91] *Id.* at 489.

[92] *See* Marc Mihaly & Turner Smith, Kelo*'s Trail: A Survey of State and Federal Legislative and Judicial Activity Five Years Later*, 38 Ecology L.Q. 703, 707 (2011) (noting that public

ida legislature commissioned a study on eminent domain, and then passed a statute narrowly defining public use.[93] The Florida law allows transferring land to private parties through eminent domain only when the purpose is for common carriers, roads, transportation services, electricity systems, and public infrastructure.[94] One commentator described Florida's reform as one of the most stringent sets of eminent domain restrictions that narrowed the definition of public use beyond even *Berman* and *Midkiff*.[95]

In Texas, the legislature limited the ability of the government to seize land for a private benefit, but it included "community development" and "urban renewal" exceptions.[96] In 2006, California's governor signed five eminent domain bills passed by the legislature,[97] but the laws faced significant criticism for lacking teeth.[98] According to one organization focused on stronger eminent domain protections, twenty-nine states received a "passing" grade for enacting strong eminent reforms since *Kelo*, while twenty-one states "failed."[99]

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outcry resulted in federal and state legislative efforts to "curtail the power of eminent domain"); *50 State Report Card*, *supra* note 19.

[93] FLA. STAT. ANN. § 73.013 (West 2012); *see* Mihaly & Smith, *supra* note 92, at 709.

[94] FLA. STAT. ANN. § 73.013(1)(a)–(e).

[95] *See* Lopez, *supra* note 32, at 591.

[96] TEX. GOV'T CODE ANN. § 2206.001(b)(3) (West 2011).

[97] S.B. 53, 2005–06 Leg., Reg. Sess. (Cal. 2006) (requiring redevelopment plans to contain significant findings of blight before eminent domain actions); S.B. 1206, 2005–06 Leg., Reg. Sess. (Cal. 2006) (revising the conditions characterizing a blighted area); S.B. 1210, 2005–06 Leg., Reg. Sess. (Cal. 2006) (revising the notice and time requirements for an eminent domain action); S.B. 1650, 2005–06 Leg., Reg. Sess. (Cal. 2006) (requiring public use to be determined by a two-thirds majority in the state congress); S.B. 1809, 2005–06 Leg., Reg. Sess. (Cal. 2006) (requiring government agency to provide a statement within sixty days describing the provisions of a plan that authorizes eminent domain).

[98] *See California*, CASTLE COAL., http://castlecoalition.org/about/1330 (last visited May 21, 2013). The bills "create a few additional procedural hoops for condemning authorities to jump through, such as requiring more details about the proposed use of the targeted property and additional findings of blight" but they are "mostly cosmetic and will not prevent determined officials from taking private property for another private party's benefit." *Id.*

[99] *See 50 State Report Card*, *supra* note 19. Six states have not passed any eminent domain legislation at all. *Id.* These states are Arkansas, Hawaii, Massachusetts, New Jersey, New York, and Oklahoma. *Id.*

II. Public Use in the Realm of Sports Stadiums

Prior to World War II, sports teams generally built their stadiums with their own private funds.[100] Since 1958, however, when the Brooklyn Dodgers moved to Los Angeles, most new stadiums have been financed using municipal bonds traditionally used to finance roads, schools, and other public endeavors.[101] Generally courts have had minimal involvement in hearing challenges to takings for privately owned sports stadiums.[102] In cases where citizens have challenged stadium projects, however, the projects have generally withstood the challenges.[103]

A. *Public Use Challenges to Sports Stadiums*

1. Establishing Public Purpose to Build Dodger Stadium

For more than forty years, the Brooklyn Dodgers played in Ebbets Field, a stadium privately financed in 1911 for $750,000.[104] By 1955, however, the team's owner, Walter O'Malley, believed the stadium was outdated and began searching for a new home for his baseball team.[105] He wrote a letter to Robert Moses, New York City's Parks Commissioner, requesting that the city condemn specific parcels of land at the corner of Atlantic and Flatbrush Avenues under the Housing Act of 1949, which encouraged local governments to address urban blight.[106] In addition to a new baseball stadium, O'Malley proposed transforming the surrounding area, including constructing a new meat market and

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[100] *See* Zachary A. Phelps, Note, *Stadium Construction for Professional Sports: Reversing the Inequities Through Tax Incentives*, 18 St. John's J. Legal Comment 981, 982–83 (2004). Before 1948, only four major stadiums were built with any public assistance. *Id.*

[101] Philip Weinberg, *Eminent Domain for Private Sports Stadiums: Fair Ball or Foul?*, 35 Envtl. L. 311, 314–15 (2005). Weinberg notes that private entities funded Yankee Stadium, Fenway Park, Comiskey Park, and Wrigley Field. *Id.* at 314.

[102] *Id.* at 320 (noting that "surprisingly scant precedent exists regarding government acquisition of property for privately owned sports stadiums").

[103] *Id.* at 316–18.

[104] *See* Jarvis, *supra* note 5, at 350. Forty different owners held title to the parcel of land for the stadium. *Id.* To keep the prices low, Ebbets formed a dummy corporation and kept the news of what he was doing away from the public and the press. *Id.*

[105] *See id.*; Manbeck, *supra* note 4.

[106] S*ee* Jarvis, *supra* note 5, at 352 & n.31 (noting that the purpose of the law was to "stimulate residential housing construction in order to alleviate the post-war shortage of affordable housing for lower and middle-income families"); Letter from Walter O'Malley, President, Brooklyn National League Baseball Club, to Robert Moses, City Construction Coordinator, City of New York (Aug. 10, 1955), *available at* http://www.walteromalley.com/images/docu/08_10_1955_wfom.pdf.

railroad station.[107] Moses rejected O'Malley's proposal, writing: "I can only repeat what we have told you verbally and in writing, namely, that a new ball field for the Dodgers cannot be dressed up as [an eminent domain] project."[108]

Los Angeles was of a different opinion than New York, and it entered into a contract with the team, promising to obtain land for a stadium if the Dodgers relocated to the West Coast.[109] The city promised to convey 185 acres of land it already owned in the Chavez Ravine and use its "best efforts" to acquire 300 total acres.[110] Instead of analyzing the city's plan using eminent domain law, however, the Supreme Court of California considered whether the contract made by the city had a proper public purpose.[111] The court held the expenditure of public funds was for a valid public purpose "even though the city [was] in effect agreeing to purchase land for the purpose of selling it immediately thereafter to a private corporation."[112] The state court reasoned that the city could not purchase land when it had no public use or purpose, but in this case, "furnishing the type of contract consideration which enables the city to enter into a bargain which it deems advantageous" was a legitimate public purpose.[113]

2. Expanding the Public Use Doctrine

After the Supreme Court of California established that stadiums could have a public purpose in a government-spending context, courts began accepting an increasing number of rationales for why sports stadiums further public purposes.[114] In *Martin v. City of Philadelphia*, in 1966, a plaintiff sued to stop city officials from implementing an ordi-

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[107] S*ee* Jarvis, *supra* note 5, at 352.

[108] *Id.*; Letter from Robert Moses, City Construction Coordinator, City of New York, to Walter O'Malley, President, Brooklyn National League Baseball Club (Aug. 15, 1955), *available at* http://www.walteromalley.com/images/docu/08_15_1955_moses.pdf.

[109] City of Los Angeles v. Superior Court of L.A., 333 P.2d 745, 747 (Cal. 1959).

[110] *Id.* at 749. The court held that "best efforts" meant that the city could spend up to two million dollars to acquire land for the stadium. *Id.*

[111] *Id.* at 751–52. The court noted that eminent domain law was unnecessary because the city government was not acquiring property for the purpose of giving it to private parties. *Id.* Instead, the city was purchasing property "as part of the consideration of a contract entered into for a legitimate public purpose." *Id.* at 752.

[112] *Id.* at 751–53.

[113] *Id.* In 1960, San Francisco used thirty-two million dollars in public funds to finance Candlestick Park and lure the New York Giants baseball team to the city. *See* Phelps, *supra* note 100, at 986.

[114] *See* Martin v. City of Philadelphia, 215 A.2d 894, 898–99 (Penn. 1966); City of Anaheim v. Michel, 259 Cal. App. 2d 835, 836, 838–39 (1968).

nance authorizing a twenty-five million dollar loan to build a sports stadium.[115] The plaintiff argued that the city ordinance unlawfully authorized increasing the city's debt for private use.[116] The court ruled for the city, however, holding that the law did not limit public purposes to traditional municipal projects.[117] Instead, the court held that public purpose also included "anything calculated to promote the education, the recreation or the pleasure of the public."[118] The court also noted that even if the public funds financed a stadium used primarily by privately held professional teams, it was still public use because the city was "providing for 'the recreation or the pleasure of the public.'"[119]

In 1968, in *City of Anaheim v. Michel*, the city attempted to use its eminent domain powers to condemn the land surrounding Anaheim Stadium to create a public parking lot for the ballpark.[120] The court held that this was a valid taking because public parking associated with a sports stadium could lessen congestion and reduce accidents, thus satisfying the public use requirement.[121] The court also noted with approval the trial court's conclusion that the stadium and surrounding parking constituted a proper public use.[122]

In the 1990s, the City of Arlington entered into an agreement with the Texas Rangers baseball franchise to create the Arlington Sports Facilities Development Authority.[123] The Arlington City Council condemned land around the stadium for a parking facility and transferred it to the Rangers.[124] The team received all privileges and rights to the revenue generated by the property in exchange for a nominal one dollar per year payment to the city.[125] In *City of Arlington, Texas v. Golddust*

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[115] 215 A.2d at 895.

[116] *Id.*

[117] *Id.* at 896.

[118] *Id.* (internal quotation omitted) (citing examples of public purposes, including gardens, parks, monuments, fountains, libraries, and museums).

[119] *Id.*

[120] *Michel*, 259 Cal. App. 2d at 836.

[121] *Id.* at 839.

[122] *Id.* The lower court noted that that the stadium and surrounding parking area constituted a proper public use, but held that the city did not have statutory authority to bring condemnation actions. *Id.* at 837.

[123] City of Arlington, Tex. v. Golddust Twins Realty Corp., 41 F.3d 960, 962 (5th Cir. 1994).

[124] *See id.*

[125] *Id.* The mayor of Arlington, when asked whether the stadium was a public use, said, "[t]here was a public benefit to building the ballpark project. The land needed to support the project had to be acquired for the project. . . . There's a mutual benefit in this project, and it's well accepted and well established in law that this project was eligible for that public purpose."

Twins Realty Corp., the landowner argued that the taking did not satisfy a valid public use because the city was not honest in stating its purpose.[126] The district court agreed and found for the landowner, but the Fifth Circuit reversed.[127] The Fifth Circuit upheld the taking, reasoning: (1) deference must be given when the Texas Legislature determined the construction a public use;[128] (2) when the government condemns the entire interest in land, the taking is valid as long as there is a public purpose;[129] and (3) multi-use stadiums utilized for more than just sporting events still further a public purpose.[130]

B. *How Atlantic Yards Broadened the Public-Use Analysis*

In December 2003, Bruce Ratner, a major real-estate developer, announced the Atlantic Yards Arena and Redevelopment Project ("Atlantic Yards Project"), a publicly subsidized development project that covered twenty-two acres around the heart of downtown Brooklyn, New York.[131] The proposed project's footprint contained two major portions: roughly half within the Atlantic Terminal Urban Renewal Area and the other half consisted of an adjacent parcel of land occupied by an assortment of privately owned housing.[132] The site was considered one of the best undeveloped tracts of real estate in the Northeast, as most of Manhattan was no more than a twenty–minute train ride away.[133]

Because private individuals and entities owned half of the proposed site for the Atlantic Yards Project, it would have cost millions of dollars and required many years to buy the land from each individual owner.[134] Due at least in part to the high costs of obtaining the land, in 2004, Ratner purchased the New Jersey Nets basketball franchise for three hundred million dollars.[135] Ratner used the team as leverage for

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Robert Bryce, *What Price Baseball?*, Austin Chron. (June 20, 1997), http://www.austinchronicle.com/news/1997-06-20/529131/.

[126] *Golddust Twins*, 41 F.3d at 963. In the lower court, Arlington, in its statement of purpose, said that the taking was for use of the property as a parking facility. *Id.*

[127] *See id.* at 966.

[128] *Id.* at 963.

[129] *See id.* at 965. Specifically, the court noted that "a court's invalidation of a condemnation on the grounds that land condemned for one purpose may not be used for another is only proper when the situation specifically requires an accurate statement of purpose." *Id.*

[130] *See id.* at 966.

[131] Goldstein v. Pataki, 516 F.3d 50, 53 (2d Cir. 2008).

[132] *Id.*; *see* Gladwell, *supra* note 11.

[133] *See* Gladwell, *supra* note 11.

[134] *See id.*

[135] Bagli, *supra* note 14.

the Atlantic Yards Project by offering Brooklyn officials a development complex that included the basketball team; an arena with architecture plans designed by architect Frank Gehry; affordable housing for teachers, firefighters, and construction workers; and a larger and better rail yard.[136] Supporters of the project claimed that Atlantic Yards would generate thousands of new jobs, hundreds of millions in new tax revenue, and new units of subsidized housing.[137] With these justifications, the Borough of Brooklyn began procedures to acquire the site through the state's eminent domain powers.[138]

Fifteen property owners in the takings area filed an action on October 2006 in the U.S. District Court for the Eastern District of New York challenging the city's use of eminent domain.[139] The plaintiffs raised three federal-law claims, asserting that the use of eminent domain in the Atlantic Yards Project would violate the Public-Use Clause of the Fifth Amendment and Equal Protection and Due Process Clauses of the Fourteenth Amendment.[140] From the project's inception, the plaintiffs primarily argued that the Atlantic Yards Project was not driven by a "legitimate concern for the public benefit."[141] Additionally, the plaintiffs argued, various government actions were at least partially motivated to benefit Ratner, who initially proposed the project and was the primary developer.[142] In short, the plaintiffs argued that the public purpose rationales for the project were pretexts for a private taking in violation of the Fifth Amendment.[143]

The district court concluded the proposed land condemnation did not violate the Public-Use Clause of the Fifth Amendment.[144] The Atlantic Yards Project would serve well-established public uses including the construction of a sporting arena, redress of blight, and creation of affordable housing.[145] The court also disagreed with the plaintiffs' pretext claim.[146] It used reasoning from *Kelo* and held that even if the plaintiffs could prove every pretext allegation, a reasonable jury could

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[136] *Id.*

[137] Anahad O'Connor, *Judge Dismisses Lawsuit Seeking to Block Atlantic Yards*, N.Y. Times, Jan. 12, 2008, at B2.

[138] *See Goldstein*, 516 F.3d at 53.

[139] *Id.* at 53–54.

[140] *Id.* at 54.

[141] *Id.*

[142] *Id.*

[143] *Id.*

[144] Goldstein v. Pataki, 488 F. Supp. 2d 254, 286 (E.D.N.Y. 2007), *aff'd*, 516 F.3d 50 (2d Cir. 2008).

[145] *Id.* at 287.

[146] *Id.* at 290.

still conclude that the public purposes offered by the city in support of the project were valid.[147] The court also rejected the plaintiffs' Fourteenth Amendment claims, holding that there was a rational basis for New York's Eminent Domain Procedure Law to sufficiently satisfy the requirements of the Equal Protection and Due Process Clauses.[148]

The Second Circuit affirmed the dismissal of the federal claims with prejudice.[149] Specifically, the appeals court noted that the plaintiffs foreclosed any chance of stopping the taking when they argued that the costs involved in the Atlantic Yards Project—as measured by the government spending and impact on the neighborhood—would dwarf the benefits of the project.[150] One of the plaintiff's central arguments, the court took it to mean that the plaintiff willingly conceded that there was *some* public benefit to be found in the project.[151] When the plaintiffs acknowledged that the project bore a rational relationship to several established categories of public uses, the court drew a contrast with claims where the asserted purpose is not legitimate or rational.[152] The court drew from *Berman* and *Kelo* and held that such a concession was a complete defense to a public-use challenge.[153]

III. A Public-Use Alternative: The Massachusetts Approach to Stadiums

Federal and many state courts afford legislatures considerable deference for public use when using state eminent domain powers.[154] Massachusetts courts, however, are skeptical about a legislature's rationale for a project's valid public use when it involves stadium projects.[155] This is in part because of the Massachusetts courts' insistence on the tradi-

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[147] *See* Kelo v. City of New London, 645 U.S. 469, 478 (2005); *Goldstein*, 488 F. Supp. 2d at 288.

[148] *Goldstein*, 488 F. Supp. 2d at 257–59, 291.

[149] *Goldstein*, 516 F.3d at 65.

[150] *See id.* at 58.

[151] *Id.* at 58–59.

[152] *See id.* at 62. The public purposes the plaintiffs conceded included the redress of blight, the creation of affordable housing, a public open space, and various mass-transit improvements. *See id.* at 64.

[153] *Id.* at 58–60; *see Kelo*, 545 U.S. at 483–84; Berman v. Parker, 348 U.S. 26, 35–36 (1954).

[154] Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 240 (1984); Berman v. Parker, 348 U.S. 26, 32 (1954); Jennifer J. Kruckeberg, Note, *Can Government Buy Everything?: The Takings Clause and the Erosion of the "Public Use" Requirement*, 87 Minn. L. Rev. 543, 550 (2002) ("[T]he Court established that the legislature's definition of public use deserves judicial deference.").

[155] *See* Opinion of the Justices, 250 N.E.2d 547, 558 (Mass. 1969).

tional analysis of public use to justify stadium projects.[156] As a result, the Massachusetts legislature writes stadium legislation to narrowly tailor public funding to finance only aspects of a project that serve a traditional public purpose.[157]

A. *Developing the Massachusetts Doctrine for Public Use*

In the 1969 *Opinion of the Justices to the House of Representatives*, the Massachusetts Supreme Judicial Court questioned a proposed House bill that provided for the "construction, maintenance, repair and operation . . . of certain public facilities consisting of a stadium complex." in Boston.[158] The court opined that a large multi-purpose stadium or arena *may* be for a public purpose, but it "is not as clearly and directly a public purpose as supplying housing, slum clearance, mass transportation, highways and vehicular tunnels, educational facilities and other necessities."[159] The court advised that the proposed legislation in this case did not sufficiently protect the public interest.[160] Despite not finding a public purpose, the justices also wrote that a public purpose could be found if the legislation included specific standards governing the use, rental, and operation of the stadium.[161] With the opinion, the justices indicated that legislation without safeguards protecting the project from private interests would not be a valid public use.[162]

Massachusetts legislators similarly view stadium projects with skepticism.[163] Thomas Finneran, Speaker of the Massachusetts House of Representatives from 1996 to 2004, told the state legislature that the "psychological value" of a sports team to the community is overstated and "are the ego-driven bunk of billionaires and their acolytes."[164] On June 15, 1999, Finneran testified before the U.S. Senate Judiciary Committee about the state's negotiations with the New England Patriots for a new

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[156] *See id.*

[157] *See, e.g.*, 2000 Mass. Acts 208, § 6; 1999 Mass. Acts 16, § 2.

[158] *Opinion of the Justices*, 250 N.E.2d at 549.

[159] *Id.* at 558.

[160] *Id.* at 560 ("In the absence of adequate statutory guidance and standards on the matters mentioned above, and of clear provision for reasonable review of compliance with appropriate standards, we are unable to advise that the stadium complex and the arena will be for a public purpose.").

[161] *Id.* at 558.

[162] *See id.* at 560.

[163] *See* Derrick Z. Jackson, *Finneran Stands Up for Taxpayers*, BOS. GLOBE, July 26, 2000, at A15.

[164] *Finneran to Tout Patriots Stadium Plan to Congress*, SUN J. (Lewiston, Me.), June 15, 1999, at C2.

stadium.[165] In language remarkably similar to the 1969 *Opinion of the Justices*, he explained that public policy in Massachusetts focused primarily on "universally important" goals such as education, infrastructure, health care, and housing.[166] He further explained that future stadiums for Massachusetts franchises would be guided by a series of principles preventing taxpayer funds from use for private purposes.[167]

Finneran testified that in considering stadium projects, Massachusetts would not (1) fund construction of the stadium facility; (2) fund the team franchise; (3) purchase and lease back land for the benefit of the franchise; (4) act as a low-cost or no-cost bank for a private, for-profit business; or (5) recognize or embrace "economic multiplier models" that justify public subsidies.[168] Furthermore, public funds would be used "solely and exclusively for infrastructure," which included on-and-off-ramps, pedestrian walkways, utilities, sewage lines, public access, and public health purposes.[169] Perhaps most importantly, any infrastructure expenditure that primarily benefitted a private interest would be taxed to pay back the state for what it spent.[170]

B. *Statutory Construction in Massachusetts Stadium Legislation*

Although there is no general law in Massachusetts restricting funding for stadiums, when the need arises, the legislature passes statutes clearly limiting how public funds can be used.[171] In two statutes involving stadiums for the Boston Red Sox and New England Patriots, Massachusetts allowed public funds only for infrastructure and utility improvements.[172] The language in the laws was also transparent and gave taxpayers a chance to see exactly how the government planned to spend their money.[173] For example, in legislation for a new stadium for the New England Patriots, the legislature described "infrastructure im-

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[165] *Stadium Financing and Franchise Relocation Act of 1999: Hearing on S. 952 Before the S. Comm. on the Judiciary*, 106th Cong. 13–20 (1999) (statement of Thomas Finneran, Speaker, Massachusetts House of Representatives) [hereinafter *Stadium Financing*].

[166] *Id.* at 14; *Opinion of the Justices*, 250 N.E. 2d at 558.

[167] *Stadium Financing, supra* note 165, at 15.

[168] *Id.*

[169] *Id.*

[170] *Id.*

[171] *See* 2000 Mass. Acts 208, §§ 2–3 (defining "infrastructure improvements" and authorizing one hundred million dollars to be spent on them); 1999 Mass. Acts 16, §§ 2–3 (defining "infrastructure improvements" and permitting city expenditures for them).

[172] *See* 2000 Mass. Acts 208, § 3; 1999 Mass. Acts 16, §§ 2, 4; *Stadium Financing, supra* note 165, at 15.

[173] *See* 2000 Mass. Acts 208, §§ 2, 4(f); 1999 Mass. Acts 16, § 2(a).

provements" in minute detail, such as "sidewalks and curbing . . . in the town of Walpole along the west side of state highway route 1 to provide for the public safety of persons walking to the stadium from parking lots located in Walpole."[174] The language of the statutes also ensured that teams do not simply get a blank check, as there are caps for the money that can be spent, with the developer responsible for budget overruns.[175]

Furthermore, the state requires provisions in its legislation that allow the state and local governments to receive a return on their investments.[176] The Foxboro Stadium Act allows the state to recover its financing costs by collecting $1.15 million in parking fees and $250,000 in administrative fees per year.[177] The state also protects taxpayers from teams who threaten to leave the state by requiring at least some reimbursement of infrastructure costs if the team leaves the site.[178] In the Fenway Park Act, the legislature included a clause requiring the team to pay up to $12.1 million per year for the lease, a cost that could be reduced by paying a percentage of revenue earned by the team.[179]

As a result, stadium bills drafted by the Massachusetts legislature are carefully constructed to protect public use.[180] In the Foxboro Stadium Act, which was enacted when the New England Patriots began looking for a location to build a new stadium, the legislature explicitly detailed how and where the state money could be spent for government takings and infrastructure development.[181] The legislators determined that building the stadium would increase economic development and general welfare by providing entertainment and tourism revenue, and thus the project constituted a valid public use.[182]

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[174] *See* 1999 Mass. Acts 16, § 2.

[175] *Id.* § 4.

[176] *See* 2000 Mass. Acts 208, § 6(a)–(b); 1999 Mass. Acts 16, § 7(2)–(3); *Stadium Financing*, *supra* note 165, at 15.

[177] 1999 Mass. Acts 16, § 7(2)–(3). The $250,000 administrative fee can be collected each year for up to twenty-five years. *Id.* § 7(3).

[178] *Id.* § 6.

[179] 2000 Mass. Acts 208, § 6(a)–(b). For instance, the statute gave the team an option to pay the city 5% of each ticket sold, 15% of the price of a private suite, and up to five dollars for each parking space. *Id.* § 6(b). In addition, tax revenue generated from vendors in the ballpark could also lower the cost of the lease. *Id.*

[180] *See* 2000 Mass. Acts 208; 1999 Mass. Acts 16.

[181] *See* 1999 Mass. Acts 16, § 2(b).

[182] *See id.* § 1. The Act also granted easements to the town for the purpose of making infrastructure improvements in the development area. *Id.* § 3(b)–(c).

Plaintiffs who owned and operated eighteen parking lots around the takings area challenged the Foxboro Stadium Act.[183] The legislation created a "parking and traffic management zone" that required licensed parking operators to pay an annual aggregate amount of four hundred thousand dollars.[184] Among their claims, the plaintiffs argued that the Foxboro Stadium Act served "no discernible public purpose" and was written only to benefit a single private party.[185] The Massachusetts Supreme Judicial Court affirmed the valid public purpose of the stadium by citing the statute's language, saying "[t]here is nothing in the record, or in the text of the Act, that would suggest that such legitimate public purposes are outweighed by any benefits conferred on a private party."[186]

When a stadium statute does not adequately promote public use, Massachusetts courts will strike down the legislation.[187] In 2000, a Massachusetts trial court heard a public stadium case in *City of Springfield v. Dreison Investments, Inc.*[188] In *Dreison*, the Massachusetts Superior Court held that the city could not use its eminent domain power to seize land for the construction of a minor league baseball stadium.[189] The city proposed the stadium as part of an urban renewal development project and intended to lease the stadium to the baseball team without charging any rent and collecting only one hundred thousand dollars per year in fees.[190] The city argued that courts in other states had found that similar lease agreements[191] served a valid public purpose, and the stadium would provide recreation and economic development.[192] The court rejected the state's economic development argument, despite the fact that other states adopted such an approach.[193] Instead, the court held the taking was invalid because the private use of the stadium su-

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[183] Route One Liquors, Inc. v. Sec'y of Admin. & Fin., 785 N.E.2d 1222, 1225 (Mass. 2003).

[184] 1999 Mass. Acts 16, § 7(b)(2); *Route One Liquors*, 785 N.E.2d at 1225.

[185] *Route One Liquors*, 785 N.E.2d at 1232.

[186] *Id.* The court also noted the legislature's determination "that the construction of a new stadium would "'significantly enhance the economic development and the general welfare of the commonwealth.'" *Id.* (citing 1999 Mass. Acts 16, § 1).

[187] *See* City of Springfield v. Dreison Invs., Inc., No. 19991318, 2000 WL 782971, at *50 (Mass. Super. Ct. Feb. 25, 2000).

[188] *Id.* at *1.

[189] *Id.* at *1, *50.

[190] *Id.* at *20.

[191] *See id.* at *42–*43. Specifically, the city noted cases in Washington, Wisconsin, and Minnesota as examples where courts have held sports stadiums are a valid public purpose. *Id.*

[192] *Id.* at *40.

[193] *Dreison Invs.*, 2000 WL 782971, at *42, *46.

perseded its public use, citing the 1969 *Opinion of the Justices* as precedent.[194] Thus, both the Massachusetts legislature and courts have limited the use of public funds and eminent domain to traditional public uses while simultaneously protecting taxpayer funds.[195]

IV. Drafting Careful Legislation for Stadium Projects Protects the Public from Improper Private Takings

One of the most troublesome aspects of sports stadiums is that they are similar to projects not traditionally considered proper objects of eminent domain, such as hotels, movie theaters, and theme parks.[196] As some commentators have noted, it is difficult to distinguish between stadiums and other privately owned entertainment venues.[197] These commentators highlight the irony that stadiums, which are accessible only by paying customers, are considered more "public" than shopping centers, even though shopping malls are accessible without charge.[198] As a result, some states have established bright-line tests delineating acceptable and unacceptable uses of eminent domain.[199] The problem, however, is that the explicit denial or allowance of specific uses of eminent domain jeopardizes mixed-use developments, including ones that may serve legitimate public purpose.[200] The best solution to this problem is an approach that permits public funding and eminent domain actions in stadium projects, but only for aspects that satisfy a traditional public-use analysis.

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[194] *See id.* at *44, *50.

[195] *See* 2000 Mass. Acts 208, §§ 2–3, 6; 1999 Mass. Acts 16, §§ 2–3, 7(2)–(3); *Dreison Invs.*, 2000 WL 782971, at *44, *50.

[196] Nichols, *supra* note 28, § 7.03[1], at 7-41.

[197] Robert G. Dreher & John D. Echeverria, Geo. Envtl. L. & Pol'y Inst., *Kelo's* Unanswered Questions: The Policy Debate Over the Use of Eminent Domain for Economic Development 41 (2006), http://www.gelpi.org/gelpi/current_research/documents/GELPIReport_Kelo.pdf.

[198] *Id.*

[199] *See, e.g.*, N.D. Const. art. I, § 16 (rejecting—through amendment to the state constitutional—economic development benefits as a public purpose and limiting eminent domain to property "necessary for conducting a common carrier or utility business"); Fla. Stat. Ann. § 73.013(1)(a)–(e) (West 2012) (limiting eminent domain conveyances only for common carriers, roads, transportation services, electricity systems, and public infrastructure); S.D. Codified Laws § 11-7-22.1 (2012) (prohibiting all private-to-private eminent domain transfers); *see also* Dreher & Echeverria, *supra* note 197, at 41–42.

[200] *See* Dreher & Echeverria, *supra* note 197, at 41–42.

A. *The Problems with Public-Use Analysis After* Kelo

1. Public Use as a Complete Defense Against Pretext Claims Could Make Challenges Against Stadium Projects Impossible To Win

The Second Circuit in *Goldstein v. Pataki* affirmed "well-established" categories of public use, but its interpretation makes it particularly difficult for plaintiffs to win challenges against stadium development.[201] The court explained that any legislative finding where a potential project fixes blight, creates affordable housing or a public open space, or improves mass transportation, is a complete defense to a public-use challenge.[202] Furthermore, as long as a taking is "rationally related to a classic public use," the court held disproportionate benefits to a private party would not make the taking unconstitutional.[203] Here, because the plaintiff willingly conceded that there was *some* public benefit in the Atlantic Yards Arena and Redevelopment Project, the redevelopment of *any* blighted area had a valid public purpose.[204]

The *Goldstein* decision illustrates the problem Justice O'Connor identified in her dissent in *Kelo*: when an economic development rationale and pretext are indistinguishable.[205] Although the Second Circuit was correct in deferring to legislative findings, in the context of large, multi-use projects such as sports stadiums, there are virtually no public-use limitations.[206] Using the *Goldstein* court's reasoning, in states that do not have laws preventing private-to-private transfers, state governments could simply target blighted areas for eminent domain and create some affordable housing, a park, or improve public transportation access to a stadium project to overcome pretext challenges.[207] As the *Goldstein* court explained, if a court finds sufficient public use, the court will not "give close scrutiny to the mechanics of a taking . . . as a means to gauge the purity of the motives of the various government officials who approved it."[208] One commentator notes this analysis al-

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[201] *See* 516 F.3d 50, 62 (2d Cir. 2008).

[202] *Id.* at 58–59.

[203] *See id.* at 62; Carol L. Zeiner, *Eminent Domain Wolves in Sheep's Clothing: Private Benefit Masquerading as Classic Public Use*, 28 VA. ENVTL. L.J. 1, 41 (2010).

[204] *Goldstein*, 516 F.3d at 58–60; *see* Berman v. Parker, 348 U.S. 26, 35 (1954).

[205] *See* Kelo v. City of New London, 545 U.S. 469, 502 (2005) (O'Connor, J., dissenting).

[206] *See* Zeiner, *supra* note 203.

[207] *See id.* at 41–42.

[208] *Goldstein*, 516 F.3d at 62.

lows classic public use to act as an "absolute shield" for "unlimited private enrichment."[209]

Although *Kelo* allowed economic development justifications for eminent domain actions, the *Goldstein* decision likely frustrates the intent of the Takings Clause and the public-use analysis.[210] Before the *Kelo* decision, lower courts acknowledging a pretext challenge did not interpret public use so broadly.[211] For instance, in *99 Cents Only Stores v. Lancaster Redevelopment Agency*, a California federal district court held that the traditional judicial deference to legislatures in determining public purpose was unnecessary when the justification is "demonstrably pretextual."[212] When the plaintiffs in *Goldstein* argued for pretext using similar reasoning, the Second Circuit rejected the approach.[213] The court explained that the plaintiffs in *99 Cents* specifically challenged whether *any* public use existed, whereas here, the *Goldstein* plaintiffs readily acknowledged that the project would result in *some* public benefits.[214] This distinction is likely a game of semantics, however, because even without the plaintiffs' concession, the same public-use rationales would still exist.[215]

2. Evidence Shows That Neither Highly Restrictive Eminent Domain Reforms Nor Lax Regulations Adequately Protect Public Use

Currently, the Castle Coalition, an organization dedicated to pursuing stronger eminent domain laws, notes that forty-four states have passed some form of eminent domain reform, and it gave twenty-nine of those states a passing grade.[216] One reform approach involves drawing clear lines establishing when eminent domain can and cannot be

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[209] Zeiner, *supra* note 203.

[210] *See* Somin, *supra* note 18, at 1211–12; Zeiner, *supra* note 203, at 41–42.

[211] *See, e.g.*, Cottonwood Christian Ctr. v. Cypress Redev. Agency, 218 F. Supp. 2d 1203, 1230 (C.D. Cal. 2002) ("Courts must look beyond the government's purported public use to determine whether that is the genuine reason or if it is merely pretext."); 99 Cents Only Stores v. Lancaster Redev. Agency, 237 F. Supp. 2d 1123, 1129 (C.D. Cal. 2001).

[212] *99 Cents Only Stores*, 237 F. Supp. 2d at 1129.

[213] *See Goldstein*, 516 F.3d at 61–62. The plaintiffs pointed to circumstantial evidence showing: (1) the developer first proposed the project and served as its primary developer; (2) the developer was also the principal owner of the New Jersey Nets; and (3) the government officials who approved the project were improperly motivated by a desire to confer a private benefit to the developer. *See id.* at 54.

[214] *See id.* at 61–62.

[215] *See id.* at 64.

[216] *See 50 State Report Card*, *supra* note 19.

used.[217] This was the approach Florida took, where voters passed eminent domain reform and adopted a constitutional amendment barring both economic development and blight takings without a three-fifths majority in the legislature.[218] The state also prohibited previously accepted public purpose rationales, such as removing blight or public nuisances, from eminent domain actions.[219] The Castle Coalition called the new laws "sweeping reforms [that produced] . . . some of the best protection in the nation."[220]

Although Florida has an "A" grade from the Castle Coalition, one commentator has criticized the reform, arguing that it prevents "beneficial takings," including constructing sports arenas.[221] Such hard-line rules may protect the public from eminent domain, but in doing so, the balance may swing too far, effectively preventing legitimate takings.[222] The only options for stadium projects become limited: either the facility becomes a government-run development, or economically advantageous projects cannot be built.[223] Furthermore, after the reforms, some city officials in Florida are disdainful, arguing that the new laws violate the government's right to conduct constitutional takings.[224]

Conversely, New Jersey received an "F" grade for failing to enact any sort of eminent domain legislation after *Kelo*.[225] But there is evidence that New Jersey's experience with lax eminent domain laws has resulted in an economic boom because of its stadium projects.[226] For sixteen years, Trenton was the only capital city in the United States without a hotel.[227] After several stadiums were constructed, beginning in the

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[217] Dreher & Echeverria, *supra* note 197, at 41–42; Joe White, *Local Governments Wary of New Eminent Domain State Laws*, Nat'l Conf. of St. Legislatures (Aug. 16, 2006), http://www.ncsl.org/press-room/annual-meeting-2006-session-summary-local-governm.aspx.

[218] Fla. Const. art X, § 6; James W. Ely, Jr., *A Report Card on Post-Kelo Eminent Domain Reforms*, Oxford Univ. Press Blog (Mar. 24, 2009, 11:08 AM), http://blog.oup.com/2009/03/eminent-domain/.

[219] Fla. Stat. Ann. § 73.014 (West 2012); *see* Mihaly & Smith, *supra* note 92, at 709.

[220] *See 50 State Report Card*, *supra* note 19.

[221] Scott J. Kennelly, Note, *Florida's Eminent Domain Overhaul: Creating More Problems Than It Solved*, 60 Fla. L. Rev. 471, 482–83 (2008).

[222] *See id.*

[223] *See id.* at 483.

[224] *See* Nicholas M. Gieseler & Steven Geoffrey Gieseler, *Strict Scrutiny and Eminent Domain After* Kelo, 25 J. Land Use & Envtl. L. 191, 220–21 (2010) (discussing two post-reform cases where reforms were ineffective at preventing eminent domain actions).

[225] *See 50 State Report Card*, *supra* note 19.

[226] *See* Richard Buck, Note, *Thou Art Condemned: How New Jersey Courts Are Sacrificing Private Landowners on the Altar of Eminent Domain*, 2 Rutgers J. L. & Urb. Pol'y 332–35 (2005).

[227] Marci Alboher Nusbaum, *In Trenton: The Changing Face of a State Capital*, N.Y. Times, Aug. 5, 2003, at C7.

1990s, new development began pouring into the state: Marriott opened a new $60 million hotel in 2002, an $18 million shopping complex was opened in the area, and Manex, a special effects company, built a $60 million production complex across from one of the stadiums.[228]

Despite New Jersey's economic success, critics argue that there are too many eminent domain condemnations in the state.[229] In 2007, Ronald Chen, the state's public advocate, released a report detailing eminent domain abuse by local municipalities.[230] It cited takings based on bogus blight determinations, due process deprivations, inadequate compensation and relocation assistance, and potential conflicts of interest.[231] After reviewing the case law, the report cited "startling injustices" that revealed "a system that lacks the basic protections necessary to prevent such injustices."[232]

B. *Massachusetts as a Guide for Stadium Construction Legislation*

1. Traditional Public-Use Analysis Should Guide State Legislatures in Stadium Construction Projects

Meaningful eminent domain rules for stadium projects should clearly define how a stadium satisfies the public-use requirement. Across many states, governments currently approve stadium projects under a broad understanding of economic development.[233] Such an approach, however, can lead to disastrous consequences.[234] One writer, in an arti-

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[228] *See* Buck, *supra* note 226; Nusbaum, *supra* note 227.

[229] Carla T. Main, *How Eminent Domain Ran Amok*, Pol'y Rev., Oct.–Nov. 2005, at 3, 22.

[230] Ronald K. Chen, Dept. of the Pub. Advocate, In Need of Redevelopment: Repairing New Jersey's Eminent Domain Laws: Abuses and Remedies: A Follow-up Report (2007), http://stopeda.org/PAReport2.pdf. The report criticizes New Jersey as "a state that never met an eminent domain project it didn't like." *Id.*

[231] *See id.* at 4.

[232] *Id.*

[233] *See, e.g.*, N.J. Sports & Exposition Auth. v. McCrane, 292 A.2d 580, 595–96 (N.J. Super. Ct. Law Div. 1971) (stating that "[i]t is virtually certain that the project will attract thousands upon thousands of others"); Press Release, District of Columbia Mayor's Office, Mayor Reaffirms His Position That Parking at New Baseball Stadium Must Not Crowd Out Development (June 12, 2006), *available at* http://wwwsouthcapitolstreet.blogspot.com/2006/06/dc-mayor-williams-june-12-2006-support.html (stating that a new stadium will create "a healthy cluster of development that will raise the standard of living for all our residents").

[234] *See, e.g.*, Reed Albergotti & Cameron McWhirter, *A Stadium's Costly Legacy Throws Taxpayers for a Loss*, Wall St. J., July 12, 2011, at A1. In the mid-1990s, the Cincinnati Bengals threatened to leave the city unless it got a new stadium. *Id.* In an unprecedented funding deal, the county government agreed to build Paul Brown Stadium and finance a majority of the project's cost. *Id.* At the time, the county projected three hundred million dollars

cle discussing the Washington Nationals baseball park wrote, "[w]e all know that stadiums rarely spur economic development. We all know they often don't lead to success in the standings . . . . The only guarantee to a new stadium is the profits it generates for the owners."[235]

In Massachusetts, the government gives stadium projects lower priority than other public policy goals such as health care and affordable housing.[236] Instead of precluding all public funding for stadium projects, however, the Commonwealth recognizes the value of sports to the community and selectively funds certain parts of a project.[237] The legislature does so by conducting a traditional public-use analysis, where it funds only infrastructure and utility improvements, such as sidewalks, parking lots, roads, sewers, and traffic signals.[238]

This approach embraces traditional understandings of public use as defined in earlier Supreme Court decisions such as *Berman v. Parker* and *Hawaii Housing Authority v. Midkiff*.[239] The novelty of the Massachusetts application is how it applies the traditional public-use analysis to a complex, quasi-private project such as a stadium. Many states conduct the analysis with an either/or proposition—either the municipality funds a large portion of a stadium, or it declines entirely, thus losing the team.[240] Massachusetts balances public use with the interests of the franchise by exercising its powers only in aspects where public use has been traditionally accepted.[241] In doing so, stadium projects can move forward, but in a way that is more consistent with the traditionally understood purpose of eminent domain laws.[242] Another advantage to the Massachusetts approach is that public use is also protected through

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in economic benefits. *Id.* More than ten years after its opening, however, stadium costs comprise 16.4 percent of the entire county budget, attendance is lower than it was in the previous stadium, and there has been almost no economic benefit to the city. *Id.*

[235] Jim Caple, Editorial, *Let the New Owner Pay*, ESPN.COM (Dec. 15, 2004), http://sports.espn.go.com/mlb/columns/story?columnist=caple_jim&id=1947248.

[236] *See Stadium Financing*, *supra* note 165, at 14.

[237] *See* 2000 Mass. Acts 208, §§ 3, 4(f); 1999 Mass. Acts 16, § 2.

[238] *See* 2000 Mass. Acts 208, § 3; 1999 Mass. Acts 16, § 2; *Stadium Financing*, *supra* note 165, at 14.

[239] *See* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 239–41 (1984); *Berman*, 348 U.S. at 35–36.

[240] *See* Adam M. Zaretsky, *Should Cities Pay for Sports Facilities?*, REGIONAL ECONOMIST, (Apr. 2001) http://www.stlouisfed.org/publications/re/articles/?id=468 (discussing teams threatening to leave unless cities offer new or updated facilities).

[241] *E.g.*, 2000 Mass. Acts 208, § 3; 1999 Mass. Acts 16, § 2; *see Kelo*, 545 U.S. at 478; *Midkiff*, 467 U.S. at 239–41; *Berman*, 348 U.S. at 28–31.

[242] *Kelo*, 545 U.S. at 478; *Midkiff*, 467 U.S. at 239–41; *Berman*, 348 U.S. at 28–31.

provisions in the legislation authorizing rent charges or tax hikes on private parties that benefit.[243]

2. Limiting Stadium Legislation to Traditional Public Use Protects Pretext Challenges in Eminent Domain Actions

One of the biggest challenges the plaintiffs in *Goldstein* encountered was that the project's footprint included both heavily blighted and non-blighted areas.[244] The court reasoned that because the city had already designated a portion of the project's area as blighted, the state could condemn un-blighted parcels "as part of an overall plan to improve a blighted area."[245] As discussed earlier, this all-or-nothing approach gave private beneficiaries and the state legislature protection from a pretext challenge because a portion of the project fell under classic public use.[246] When the town of Springfield attempted a similar strategy in *City of Springfield v. Dreison Investments, Inc.*, the Massachusetts Superior Court rejected the approach, stating that its eminent domain action was invalid, even though it was for municipal purposes.[247]

The result in *Dreison* is instructive because it highlights how Massachusetts courts interpret public use in light of economic development justifications.[248] The Supreme Court has established that government cannot take private property for the sole purpose of conferring a benefit on a private party.[249] The problem with stadium projects is that although almost every sports franchise is privately owned,[250] states and municipalities experience tangible economic benefits as a result of stadium deals.[251] The proper approach to determine whether there is valid public use in an eminent domain action comes from Massachusetts.

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[243] *See* 2000 Mass. Acts 208, § 6; 1999 Mass. Acts 16, § 7.

[244] 516 F.3d at 53. The court noted that approximately half of the land was "heavily blighted area," but the land held by private parties had "less blight," including some areas where no blight existed at all. *Id.* at 53, 60.

[245] *Id.* at 60.

[246] *Id.* at 58–59.

[247] *See* No. 19991318, 2000 WL 782971, at *35, *50 (Mass. Super. Ct. Feb. 25, 2000).

[248] *See id.*

[249] *See Midkiff*, 467 U.S. 229, 245; Charles E. Cohen, *Eminent Domain After* Kelo v. City of New London: *An Argument for Banning Economic Development Takings*, 29 HARV. J.L. & PUB. POL'Y 491, 512–15 (2006) (discussing cases requiring some public benefit for private takings).

[250] *See* Dave Zirin, *Those Non-Profit Packers*, NEW YORKER: THE SPORTING SCENE (Jan. 25, 2011), http://www.newyorker.com/online/blogs/sportingscene/2011/01/those-non-profit-packers.html (noting that out of all major professional sports franchises, only the Green Bay Packers is owned by the city).

[251] *See* Buck, *supra* note 226; Nusbaum, *supra* note 227.

As seen in the Foxboro Stadium Act and Fenway Park Act, the state legislature funds only portions of the project that meet a traditional public-use test; the rest must be privately funded.[252]

Applying the Massachusetts approach to the *Goldstein* case could have preserved pretext and public-use challenges.[253] The *Goldstein* decision received criticism because the court's reasoning could effectively neutralize even strong eminent domain protections, such as those in Florida.[254] Under the *Goldstein* court's analysis, projects designed primarily for private parties can simply include any classic public use, such as new streets and roads, to avoid any constitutional challenges.[255] Under the Massachusetts framework, the concerns about allowing classic public use to be included as an incidental benefit to a stadium project could be avoided.[256]

Of course, there is always the possibility that government agencies could get a blight designation for a majority of the land desired by private parties.[257] Such a concern, however, is less likely in Massachusetts because stadium legislation explicitly delineates what qualifies as public use.[258] By limiting the definition of public use, expenditures of public funds and eminent domain takings will almost always satisfy public-use requirements, while allowing stadium projects to commence.[259] In cases where principles outlined in *Opinions of the Justices* are not properly enacted, such as the *Dreison* case, courts will declare the project unconstitutional.[260] Thus, a court applying Massachusetts public-use principles to *Goldstein* would have aligned the reasoning with *Kelo*, preventing a transfer of property that "would certainly raise a suspicion that a private purpose was afoot."[261]

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[252] *See* 2000 Mass. Acts 208, §§ 2, 3; 1999 Mass. Acts 16, §§ 1, 2; *Stadium Financing*, *supra* note 165, at 14.

[253] *See* Goldstein, 516 F.3d at 65, *supra* notes 233–243 and accompanying text.

[254] *See* Zeiner, *supra* note 203, at 42.

[255] *See id.*

[256] *See* Somin, *supra* note 18, at 1213; Zeiner, *supra* note 203, at 42; *supra* notes 233–243 and accompanying text.

[257] *See* Somin, *supra* note 18, at 1218.

[258] *See* 2000 Mass. Acts 208, §§ 2, 3; 1999 Mass. Acts 16, §§ 1, 2; *Stadium Financing*, *supra* note 165, at 15.

[259] *See* 2000 Mass. Acts 208, §§ 2, 3; 1999 Mass. Acts 16, §§ 1, 2; *Stadium Financing*, *supra* note 165, at 15.

[260] *See* Opinion of the Justices, 250 N.E.2d 547, 560 (Mass. 1969); *Dreison Invs.*, 2000 WL 782971, at *44.

[261] *See* Kelo, 545 U.S. at 487; *supra* notes 233–243 and accompanying text.

Conclusion

Although it remains to be seen whether the Nets will find greater sports success in a new city and arena, the legal proceedings behind the move sets an extremely difficult precedent for plaintiffs challenging future eminent domain actions. In *Goldstein v. Pataki*, the Second Circuit Court of Appeals held that any classic public-use rationale was a "complete defense" to a public-use challenge.[262] Multi-purpose stadium developments, which inevitably require large infrastructure improvements and public accommodations, will always satisfy *Goldstein*'s requirements.

Massachusetts's experience upgrading Fenway Park and passing legislation for a new football stadium is instructive. The Commonwealth follows principles that find a middle ground between public purpose and private benefit for sports franchises. The Massachusetts approach limits expenditures of public funds on stadium projects to those portions that are a traditional public use. At the same time, the Commonwealth also ensures a stream of revenue from private beneficiaries to recover its expenditures through taxes and lease agreements. In the eminent domain context, these principles give the Commonwealth the flexibility of acquiring land for public use, such as parking and infrastructure improvements, while leaving private parties responsible for the bulk of the stadium.

This approach has not hurt the teams that play in Massachusetts, as the Commonwealth has the third most valuable NFL franchise,[263] the third most valuable MLB franchise,[264] the fourth most valuable NBA franchise,[265] and the fifth most valuable NHL franchise.[266] Although there are numerous factors that go into creating a successful sports franchise, these Massachusetts teams have found economic success while protecting taxpayers and the Commonwealth.

Many states are still trying to find a balance between satisfying private, profit-driven sports franchises and the public. Some states enacted

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[262] *See* Goldstein v. Pataki, 516 F.3d 50, 58–60 (2d Cir. 2008).

[263] *NFL Team Valuations: #3 New England Patriots*, Forbes.com, http://www.forbes.com/lists/2010/30/football-valuations-10_New-England-Patriots_307338.html (last visited May 17, 2013).

[264] *MLB Team Values: The Business of Baseball*, Forbes, http://www.forbes.com/mlb-valuations/ (last visited May 17, 2013).

[265] *NBA Team Valuations: #4 Boston Celtics*, Forbes, http://www.forbes.com/lists/2010/32/basketball-valuations-11_Boston-Celtics_326173.html (last visited May 17, 2013).

[266] *NHL Team Valuations: #5 Boston Bruins*, Forbes, http://www.forbes.com/lists/2010/31/hockey-valuations-10_Boston-Bruins_313364.html (last visited May 17, 2013).

narrow redefinitions of public use that allow only a small category of projects to fall under eminent domain powers, while other states performed no reform at all. Both approaches have seen some success, but critics note they either limit too many projects or influence out-of-control eminent domain actions. By putting its focus directly on how to best maximize public use for what is inherently a private enterprise, Massachusetts fulfills its fiduciary duty to its citizens.